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New York's Anti-SLAPP Act: An Unnecessary Chill on the First Amendment Right to Petition

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It is well established that the First Amendment's right to petition clause affords constitutional protection to the bringing of lawsuits, even those that lose, so long as not frivolous. But in recent years many states, including New York, have imposed a high price on the exercise of that constitutional right. Thus, in 2020, New York significantly revised its anti-SLAPP Act (Civil Rights Law §§70-a and 76-a)to vastly expand the scope of cases which fall within its purview. The purpose of the bill was described in the bill jacket as to "protect citizens' from *frivolous* litigation."

In practice, the amendments have *not* been confined to frivolous lawsuits and have often had the effect of stifling defamation lawsuits-even if brought in good faith to redress significant reputational harm. The statute makes life difficult for defamation plaintiffs through its combination of (1) heightened, evidence-based dismissal rules applied *before* discovery,(2) a heightened fault standard,(3) an automatic stay of most discovery once a defendant files an anti-SLAPP motion to dismiss, and (4) mandatory fee-shifting when a plaintiff cannot meet the statute's "substantial basis" threshold. The result: plaintiffs with colorable, good-faith claims face a Hobson's choice—abandon the suit or risk a costly, early, evidence-driven show-down they may be unable to win without discovery.

Credit: Devon Yu/Adobe Stock

Fake Dictionary, Dictionary definition of word defamation.

New York's anti-SLAPP Act applies to actions "involving public petition and participation." Prior to the 2020 amendments, only a limited number of cases were so classified. But following the amendments, the definition of "public petition and participation" was

broadened to encompass all communications made "in connection with an interest of public interest," which courts were directed to construe broadly. *See* N.Y. Civ. Rights Law §76-a. Suddenly, almost all defamation lawsuits–even those brought by individuals against large media conglomerates–fall within the anti-SLAPP Act's onerous grasp.

Most importantly, the statute creates a special early dismissal mechanism through CPLR 3211(g)where a plaintiff must show that the claim has a "substantial basis in law." In *Reeves v. Associated Newspapers, Ltd.,* 228 A.D.3d 75 (1st Dep't 2024), the First Department interpreted the statutory requirement as requiring a plaintiff to present "such relevant *proof* as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Importantly, the anti-SLAPP Act also requires a plaintiff to show that the statements were published with actual malice—the highest fault burden applicable to a defamation claim. *See* N.Y. Civ. Rights law §76-a(2). These burdens are summary judgment like in nature, but unlike all other litigants facing such a standard to survive dismissal, a plaintiff in a defamation case must typically make his evidentiary showing *without* discovery, because discovery is stayed pursuant to the anti-SLAPP legislation.

Crucially, if a plaintiff cannot meet this heightened standard—that the claim has a "substantial basis"—the defendant who prevails is entitled to reasonable costs and attorneys' fees. N.Y. Civ. Rights Law §70-a. The fee shifting called for under the anti-SLAPP Act is not merely remedial. The bill jacket justified the amendment changing fee shifting from discretionary to mandatory as requiring "an award of costs and fees, but only if the court [finds] that the case has been initiated or pursued in bad faith."

However, this is not what courts have done. Instead, courts automatically award fees and costs whenever a defamation plaintiff loses a motion to dismiss, even when not finding that the case was brought or pursued in bad faith. Accordingly, a plaintiff, despite having a good faith belief in their cause of action, could be liable for hundreds of thousands of dollars if they are unable to come up with evidence of the defendant's state of mind prior to discovery. Thus, while the sponsor of the amendments in the State Senate, Brad Hoylman-Sigal, wrote that the proposed amendments would "not discourage meritorious litigation," that prediction seems at best questionable.

Consider what this means in practice: a hypothetical individual plaintiff can and does prove that a media conglomerate acted negligently and irresponsibly by publishing false claims about him that savaged his reputation. However, because the plaintiff is not provided with the discovery he would need to prove that the negligent conglomerate also acted with actual malice, the individual will not only suffer the dismissal of his lawsuit but will also be ordered to pay the legal fees charged by the media company's expensive lawyers.

As a result, corporate defendants have every incentive to litigate aggressively on a motion to dismiss. This dynamic heavily favors

institutional defendants with the sophistication and resources to mount a full-fledged, aggressive, motion to dismiss as compared to individual plaintiffs who lack comparable resources. For a smaller plaintiff, the potential ramifications of losing an anti-SLAPP Act motion to dismiss and thus being responsible for hundreds of thousands of dollars in legal fees could be truly existential. Thus, while the New York State Bar Committee on Media Law wrote a letter in support of the bill claiming that it would provide "critical protection from powerful individuals who file baseless claims," and that it would "ensure a level playing field between the powerful and powerless by requiring SLAPP plaintiffs to cover defendant's legal expenses in the event of a dismissal," it completely ignored that many defamation claims are brought by private individuals without significant resources against large media entities.

By attempting to "level" the playing field to give all defendants an advantage, the New York anti-SLAPP Act has tilted the balance in favor of large institutional defendants as against private individuals who seek only to restore their good reputations. Another consequence of the amendments is that defamation plaintiffs who have the ability to have their cases heard in federal rather than state court now make that choice, given that under the *Erie* doctrine, the onerous procedural aspects of New York's legislation are likely to be unenforceable in federal court.

Defamation law has always attempted to balance two critical components of the First Amendment: a plaintiff's right to petition the court for redress and a defendant's right to free speech. However, by tilting the scales so heavily in favor of defendants, on both the burden to survive a motion to dismiss and the penalty for a plaintiff who is unable to do so, New York's amended anti-SLAPP risks weeding out all but the most ironclad defamation suits, while everyday people and smaller entities find the courthouse effectively doors closed to them.

Thus, while the 2020 amendments to New York's anti-SLAPP Act might have been intended to prevent frivolous lawsuits, the broad application of the Act, coupled with its heightened fault requirement, evidentiary burden on a pre-discovery motion to dismiss, and the mandatory fee shifting that it provides for have created a situation which could deter most defamation lawsuits regardless of underlying merit.

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